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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ARIZONA, ET. AL.,

Petitioners,

versus

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, ET AL.,

Respondents.

BRIEF OF RESPONDENT SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the decisions of the Ninth Circuit Court of Appeals conflict with any decisions of this Court.

II. Is the conflict between the decisions of the Ninth Circuit Court of Appeals and the Tenth Circuit ruling in *Jicarilla Apache Tribe v. United States* an adequate basis for granting certiorari in view of the inadequate record on the *Akin* issue and the remand on the State Constitutional issue.

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STATEMENT OF THE CASE

The Petition for Certiorari in the Arizona cases does not adequately describe the pertinent history of this litigation. Relevant additional circumstances are that the Salt River adjudication which affects this respondent deals with lands which are overwhelmingly federal and which include only insignificant private and state interests; the federal District Court proceedings were undertaken before enactment of the present state water code and before any adjudication petitions reached the state court; and the District Court did not hold hearings or make findings on the "wise judicial administration" factors and this aspect of the case was accordingly not reviewed by the Ninth Circuit.

The Petition for Certiorari also omitted mention of the positions asserted by the Justice Department in the state court proceedings pending the appeal to the Ninth Circuit. The United States, in the role it assumed as advocate of

the Indian interests, asserted in the remanded state court proceedings that Arizona is prohibited by its disclaimer from asserting jurisdiction over Indian water rights; the state proceeding is not a "suit" in the contemplation of the McCarran Amendment; and the Arizona water code confers an adjudicatory role on the Department of Water Resources which is an admitted adversary of Indian water rights' claims.

The adjudication proceeding affecting the Salt River tribes, i.e. Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, and Payson Community of Yavapai-Apache Indians, originated with the filing of an adjudication petition on April 26, 1974. It was filed in the Arizona Land Department, a state executive agency, by the Salt River Valley Water Users' Association, an association of owners of non-Indian lands lying below the Granite Reef Dam. This proceeding lay dormant in the Land Department until its service by certified mail was undertaken in early February, 1979. The Salt River adjudication petition did not, as stated on page 7 of the petition for certiorari, seek a determination of water rights in the Salt River and tributaries. Rather it placed in issue the rights in "*the Salt River above Granite Reef Dam and its tributaries including Tonto Creek, excluding Verde River and its tributaries." A separate petition affecting the Verde River and the Fort McDowell Mohave-Apache Indian Community has not been served.

The lands affected by the upper Salt River adjudication petition are the overwhelmingly federal lands in the Salt River watershed area. Affidavits filed in the District Court by the United States establish that this upper Salt area includes 3,058 square miles of Indian Reservation lands, 2,575 square miles of Tonto National Forest, 391 square miles of Apache-Sitgreaves National Forest, and 8 square miles of lands administered by the Bureau of Land Management.

The Salt River Valley Water Users' Association represents totally non-reservation lands below Granite Reef

Dam. Its obvious interest is to place a tight lid on the federal upstream claims.

The upper Salt River adjudication was still before the State Land Department when the affected Indian tribes filed the United States District Court removal petitions and complaints itemized in footnotes on pages 8 and 9 of the petition for certiorari. In April, 1979, several weeks after these actions were filed in the District Court, the Arizona Legislature amended the state water code to provide that stream adjudications pending in the State Land Department be transferred to the State Superior Court. A.R.S. § 45-258, 1979 Session Laws, Thirty-Fourth Legislature, First Regular Session, Chapter 139. Accordingly, the upper Salt River and Verde River adjudication petitions were first filed in the Superior Court of Maricopa County after they were remanded to it by the District Court by order dated January 15, 1980 and filed on January 18, 1980.

The District Court did not conduct an evidentiary hearing on the *Akin* factors or any other issue. It did not make findings on those "clearest of justifications" for dismissing the Indian actions as mandated by *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 819. Its treatment of the *Akin* factors is stated in one paragraph of its opinion:

> "Beyond the Congressional policy expressed by the McCarran Amendment, the Court [in *Colorado River Water Conservation District*] noted that the 'apparent absence of proceedings in the District Court other than filing of the complaint, prior to the motion to dismiss' and 'the extensive involvement of State water rights occasioned by this suit naming 1000 defendants' were significant factors consistent with the policy underlying the enactment of the McCarran Amendment. Both these factors are present in the cases now before this Court." Pet. for Cert., p.E-8.

There is no discussion as to why federal court litigation would be any more piecemeal than state court litigation and there had not in fact been extensive involvement in the state court before the District Court's jurisdiction attached.

The petition for certiorari states that: "On November 25, 1981, the Arizona Supreme Court consolidated the adjudications of the Salt and Verde rivers into the Gila River System adjudication." This of course occurred after submission of briefs and oral argument in the Ninth Circuit and its effect on the *Akin* considerations has not yet been examined.

On this record the Ninth Circuit could not review the *Akin* factors, but stated simply: "We note that the district judge did not make findings on this issue and the record indicates significant differences between these cases and the *Akin* case." Pet. for Cert., p.A-10.

If in fact the *Akin* issue is not ripe for review the question arises whether this Court should reach over it to decide, perhaps gratuitously, the important first-impression issue of the effect of the Western state constitutional disclaimers on state jurisdiction over vital Indian reservation water rights.

After the District Court remanded the Salt River adjudication petition to the state court the United States appeared for the affected Indian tribes. On or about February 1, 1982, the Justice Department, by a Motion to Dismiss, asserted that Arizona's disclaimer prohibits it from exercising jurisdiction over Indian reservation water rights; and that the Arizona water adjudication system does not provide for judicial litigation, as contemplated by the McCarran Amendment, but rather it vests fact and law decisional authority in an administrative agency. The problem raised by this administrative scheme is particularly pertinent in respect of Indian claims. The administrative agency is the Arizona Department of Water Resources which, the Justice Department claims, is an unabashedly vocal adversary of Indian water rights.

ARGUMENT

I

THE DECISIONS OF THE NINTH CIRCUIT IN THE ARIZONA CASES DO NOT CONFLICT WITH ANY OF THIS COURT'S DECISIONS

A. The Ninth Circuit Decisions do not Conflict with *Colorado River Water Conservation District v. United States.*

There is no substance to the argument that the Ninth Circuit disregarded the policies pronounced in *Colorado River Conservation District.* The Ninth Circuit did not rule on that question because there was no record to support a ruling.

The *Colorado River Conservation District* doctrine is not a general rule of abstention. It holds that district courts have the "virtually unflagging obligation" to exercise jurisdiction given them, 424 U.S. 800, 817; and "[o]nly the clearest of justifications will warrant dismissal." 424 U.S. 800,819. It mandates that a district court can dismiss actions properly before it only if it can identify and define with some precision the substantial factors justifying the dismissal. Where the parties are Indian tribes who have invoked federal jurisdiction out of concern for fair treatment in dealing with substantial federal questions the policy against dismissal has particular force.

Would the exercise of federal jurisdiction in this case result in duplicative litigation? Is the location of the Maricopa County Superior Court more convenient for parties and witnesses? Does Arizona law provide more efficient adjudication procedures that those that would be followed in the federal court? Are the parties who prefer the state over the federal forum seeking a more efficient adjudication or are they apprehensive that the federal court will unduly favor Indian interests? The Ninth Circuit could not review these questions because they had not been dealt with in the District Court.

The Ninth Circuit, in refusing to uphold the District Court's dismissal of the Indian claims did not violate the law ordained by this Court. It did the only thing it could do.

B. The Ninth Circuit Decisions do not Conflict with Decisions of this Court on the Disclaimer Provisions.

The petitioners argue that the Ninth Circuit decisions conflict with this Court's decisions on the disclaimer provisions. This argument is based upon *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Williams v. Lee*, 358 U.S. 217 (1959); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); and *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165 (1977). From each of these cases the petitioners select a few threads to make new cloth.

Organized Village of Kake held that Alaska's disclaimer did not enjoin it from regulating the use of fish traps by individual Indians in off-reservation waters. A more pertinent case, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), dealing with state jurisdiction over Indians on reservations, puts *Organized Village of Kake* in its proper place:

> "But that holding came in the context of a decision concerning the fishing rights of *non-reservation* Indians. See id., at 62. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians." 411 U.S. 164, 176, footnote 15 (italics in original).

The petitioners' citation of *Puyallup Tribe, Inc.* for the proposition that Washington has jurisdiction over fishing on Indian reservations is somewhat imprecise. The opinion in that case notes that under two Acts of Congress all but 22 acres of the Puyallup reservation was alienated in fee simple; that none of the remaining 22 acres abuts on the Puyallup River; and that the tribe and its members do not hold fishing grounds for their exclusive use.

Mescalero Apache Tribe holds that a state's gross receipts tax may be imposed on an Indian enterprise operated on off-reservation land. It was decided on the same day as *McClanahan* which reached an opposite result where the state tax was imposed on an Indian on a reservation.

Williams v. Lee, 358 U.S. 217 (1959) holds that the Superior Court of Arizona should not assume jurisdiction over a claim for relief arising on an Indian reservation where the exercise of that power would conflict with the jurisdiction of tribal courts. This Court noted that Arizona had not elected to assume jurisdiction over Indian lands under the Act of August 15, 1953, P.L. 83-280, and Arizona has an express disclaimer of jurisdiction over Indian lands. 358 U.S. 217, 222-223.

This Court has never held or hinted that a state's constitutional disclaimer, required by Act of Congress, was meaningless, or was repealed by tacit implication, or that it should be disregarded to achieve some judicially crafted public policy objective. To the contrary, it has held that disclaimer provisions stand until expressly and properly repealed. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1972); *Washington v. Yakima Indian Nation,* 439 U.S. 463 (1979).

The Ninth Circuit was faithful to all the decisions of this Court in holding that the Arizona disclaimer was effective unless repealed and remanding the cases for findings on that question.

II
THE CONFLICT BETWEEN THE NINTH AND TENTH CIRCUITS IS NOT AN ADEQUATE BASIS FOR GRANTING CERTIORARI IN THIS CASE

The Ninth Circuit's discussion of the Arizona disclaimer provision is inconsistent with the Tenth Circuit's ruling in *Jicarilla Apache Tribe v. United States,* 601 F.2d 1116, *cert. denied,* 444 U.S. 995 (1979). That however is not good rea-

son for granting certiorari in the special circumstances of this case.

The Ninth Circuit did not definitively rule on either of the major issues before it. The threshold issue should be the "wise judicial administration" question as defined in *Colorado River Conservation District*. This issue comes first because this court has already studied the matter and issued the guidelines for its determination. The District Court did not follow those guidelines so the Ninth Circuit crossed over it to deal with the State Constitutional issue.

Nor is the Ninth Circuit's ruling on the state Constitutional issue final. That court was concerned that the record did not disclose whether the State of Arizona had taken jurisdiction over Indian lands under Public Law 280.

Additional substantial federal questions, determinative of this case but not yet dealt with in the lower courts, are the issues raised by the United States in the state court proceedings. The United States has asserted there that the state water code does not prescribe a McCarran state court procedure. The state procedure is essentially administrative with substantial primary jurisdiction over fact and law issues vested in the Arizona Department of Water Resources. The United States has demonstrated in papers filed in the state court that the Department of Water Resources is an adversary of Indian water interests.

The remand to the District Court ordered by the Ninth Circuit will not be a meaningless diversion. It will rather result in a hearing and an original determination of a range of fundamental loose ends.

The confused posture of this case is comparable to those cases which are dismissed upon appeal taken under 28 U.S.C. § 1254(2) because of an obscure record or lack of finality. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); *Naim v. Naim*, 350 U.S. 891 (1955); *Cowgill v. California*, 396 U.S. 371 (1970). A writ of certiorari should similarly be dismissed where the issue, though

significant, is not squarely presented by a coherent record. *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981).

CONCLUSION

The Ninth Circuit did not run afoul of any of this Court's decisions. This Court cannot properly review the *Colorado River Conservation District* issue for want of an adequate record. The disclaimer issue has been remanded for further consideration and the result of further district court proceedings is uncertain. Review of this case at this time is accordingly premature.